Public Comment on Proposed Rulemaking: Region 4 Air Docket R04-OAR-2006-0649

To: Kelly Fortin
Air Planning Branch
Air, Pesticides and Toxics Management Division
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street SW
Atlanta, GA 30303-8960
fortin.kelly@epa.gov

By: John D. Walke
Colin C. O'Brien
Natural Resources Defense Council
1200 New York Ave., N.W., Ste. 400
Washington, DC 20005
(202) 289-2426
jwalke@nrdc.org

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[Please note: The documents listed and numbered at the end of these comments were sent yesterday by overnight mail to Ms. Fortin, for delivery today. The entirety of each of those documents is hereby incorporated by reference into these comments. Wherever one of those documents is cited in these comments, it is identified by the title (or an abbreviation thereof) and attachment number that appears in the list at the end of these comments.]

INTRODUCTION

Natural Resources Defense Council (NRDC)[1] is pleased to comment on EPA's proposal entitled: "Approval and Promulgation of Implementation Plans; Georgia; Prevention of Significant Deterioration and Nonattainment New Source Review Rules," 73 Fed. Reg. 51,606, *et seq.* (Sept. 4, 2008) ("the proposal"). The proposal states:

> EPA is proposing to partially approve and disapprove portions of revisions to the Georgia State Implementation Plan (SIP) submitted by the State of Georgia [to] modify Georgia's Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) permitting rules in the SIP to address changes to the federal New Source Review (NSR) regulations, which were promulgated by EPA on December 31, 2002, and reconsidered with minor changes on November 7, 2003 (collectively, these two final actions are referred to as the "2002 NSR Reform Rules").

73 Fed. Reg. 51,606.

[1] NRDC submits these comments on behalf of itself and its more than 5,400 NRDC members who reside in Georgia.

Provisions in Georgia's submissions prevent the state's revised implementation plan from "meet[ing] applicable requirements" of the Clean Air Act. 42 U.S.C. § 7410(k)(3). They also cause the revised plan to "interfere with [] applicable requirement[s]" of the Act, *id.* § 7410(l), and to violate outright the Act's proscription against "backsliding" in nonattainment areas. *Id.* § 7515. The Act does not authorize EPA to approve such a plan revision. *See id.* § 7410(k)(3) (authorizing EPA to approve an implementation plan revision, or portion thereof, that "meets all the applicable requirements of this chapter"). In fact, the Act prohibits the agency from doing so. *Id.* § 7410(l) (EPA "shall not approve a revision of a plan if the revision would interfere with any . . . applicable requirement of [the Act]"). Therefore, if EPA approves Georgia's revised plan—even partially—that that action will be "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law." *Id.* § 7607(d)(9)(A).

The proposal further states that EPA is proposing to disapprove a portion of Georgia's planned revisions to the State's SIP. More specifically, EPA has proposed to disapprove of the state's incorporation of "baseline emissions calculations" into the Georgia NNSR provisions for the generation of Emissions Reductions' Credits to be used as offsets. EPA must disapprove this unlawful proposed change.

DISCUSSION

A. Provisions in Georgia's Submissions Cause the State's Revised Plan to Interfere with Applicable Requirements Concerning Attainment and Reasonable Further Progress.

Provisions in Georgia's submissions cause the state's revised plan to "interfere with [] applicable requirement[s] concerning attainment and reasonable further progress." *Id.* § 7410(l). Specifically, the following provisions in Georgia's submission cause the state's revised plan to interfere with the statutory requirements that a state plan provide for attainment, prohibit emissions that interfere with attainment or maintenance, and require reasonable further progress toward expeditious attainment, *see id.* §§ 7410(a)(2)(C) ("provide for the . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved"), 7410(a)(2)(D)(i) ("contain adequate provisions . . . prohibiting" significant contribution to nonattainment – or interference with maintenance – of any national ambient air quality standard in another state), 7502(c)(1) ("provide for attainment of the national ambient air quality standards"), 7502(c)(2), 7501(1), 7502(a)(2)(A)-(B) ("require reasonable further progress" toward "attainment of the applicable national ambient air quality standard[s]" "as expeditiously as practicable"):

391-3-1-.02(7)(a)
391-3-1-.02(7)(b)15
391-3-1-.02(7)(b)21
391-3-1-.03(8)(c)
391-3-1-.03(8)(g)

As EPA has previously acknowledged, "Section 110(l) of the CAA provides that EPA shall not approve a SIP revision if the revision interferes with any applicable requirements

concerning attainment and reasonable further progress, or any other applicable requirements of the CAA." 60 Fed. Reg. 10,506/2 (Feb. 27, 1995) (disapproving of two proposed SIP revisions submitted by Tennessee). Accordingly, "Approval of [a] SIP revision require[s] review of that SIP revision and determination that it complies with section 110(l) of the Act." 69 Fed. Reg. 56,173/1 (Sept. 20, 2004). Where such determination has not been conducted, approval to revise a SIP must be withheld. *Id.* ("EPA was not, and is not, in this rulemaking taking action on Kentucky's September 22, 2003, SIP revision to transfer the Jefferson County VET Program to a contingency measure in the SIP. ... Approval of the SIP revision to transfer the VET Program to the contingency portion of the SIP will require review of that SIP revision and determination that it complies with section 110(l) of the Act. That analysis has not yet been completed.")

A SIP revision that "will cause no degradation of air quality ... is consistent with the CAA, specifically section 110(l)." 71 Fed. Reg. 68,742/1 (Nov. 28, 2006). SIP revisions that result in emissions increases, however, violate Section 110(l) and may not be approved by EPA. *See* 60 Fed. Reg. 10,506/2 ("[T]he State rule[] corresponds with a VOC emission rate of approximately 25 lbs/day, which is more than five times EPA's recommended rate. Therefore, EPA is disapproving [it].").

The 2002 NSR Reform Rule provisions that were not vacated by the D.C. Circuit in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) allow previously-prohibited emissions-increases to occur. *See* Petition for Reconsideration of American Lung Association, *et al.* (May 8, 2003) (Attachment 8), at 1-93; Reconsideration Comments of NRDC, *et al.* (Aug. 28, 2003) (Attachment 10), at 3-17, 19-27; Final Opening Brief of Environmental Petitioners (Attachment 16), at 11-33, 45-47; Brief of Government Petitioners (Attachment 17) at 16-35, 44-47, 51-53; Final Reply Brief of Environmental Petitioners (Attachment 18) at 2-16, 21-23; Reply Brief of Government Petitioners (Attachment 19) at 2-15, 21-26; Abt. Associates, *Nucor Steel Analysis* (Attachment 1); Abt. Associates, *Mobile Joliet Analysis* (Attachment 2); Environmental Integrity Project, *Bright Lines or Loopholes?* (Attachment 3); Affidavit of Craig A. Wright (Attachment 4); Affidavit of Dr. Iclal Atay (Attachment 5); Affidavit of Marc Allen Robert Cone, P.E. (Attachment 6); National Academy of Public Administration, *A Breath of Fresh Air* (Attachment 7); General Accounting Office, *EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program* (Attachment 9); Connecticut, *et al.* Reconsideration Comments (Attachment 11); Delaware Reconsideration Comments (Attachment 12); Environmental Integrity Project Letter to EPA (Attachment 13); William R. Moomaw, *Assessment of "Reform or Rollback?"* (Attachment 14); Environmental Integrity Project, *Additional Results and Corrections* (Attachment 15).

[Please note: The 2002 rule provisions considered by the D.C. Circuit in *New York v. EPA* were EPA regulations, not state ones. The court thus had no occasion to decide whether EPA could approve any state's versions of any of the 2002 rule provisions consistently with section 110(l) of the Act. *Cf.* 69 Fed. Reg. 54,006, 54,008/3 (Sept. 7, 2004) ("[C]ertain requirements in the submitted NSR program may not be needed to satisfy CAA NSR requirements for major sources and major modifications, but are necessary to provide EPA with the basis to approve the overall NSR program revision to supersede the existing SIP-approved Clark County NSR program under section 110(l)").]

EPA does not deny that the 2002 NSR Reform Rule provisions that were not vacated by the D.C. Circuit in *New York v. EPA* allow previously-prohibited emissions-increases to occur. *See, e.g.,* Brief for Respondent United States Environmental Protection Agency *in New York v. EPA* (filed Oct. 26, 2004) at 78-79 (estimating that, in practice, "the change in the method for calculating baseline actual emissions" will allow "a higher baseline" for a group of non-electric utility sources that account for 3 percent of the total annual emissions-increases from all existing and new non-electric utility and electric utility sources in the United States); *id.* at 81 ("some small number of facilities may be able to increase emissions without being subject to NSR under the revised rule when they would not have been able to do so under the old rule"); EPA, Supplemental Analysis of the Environmental Impact of the 2002 Final NSR Improvement Rules (Nov. 21. 2002), at 14 ("the actual-to-projected actual test would reduce the number of sources who would need to take permit limits"). *Accord New York v. EPA*, 413 F.3d at 28 ("EPA acknowledges that fewer changes will trigger NSR under the 2002 rule than under the 1980 rule").

The above-listed provisions in Georgia's revised permit program track those 2002 rule provisions, *see, e.g.,* 73 Fed. Reg. at 51,608/3 ("The changes to Georgia's PSD rules ... were made to update the existing Georgia rules to meet the requirements of the 2002 NSR Reform Rules. ... Georgia's PSD rules incorporate by reference (IBR) the federal PSD rules at 40 CFR 52.21, as amended by January 29, 2006."); *id.* at 51,609 ("The Georgia NNSR Rules incorporate applicable provisions from the state's PSD rules (391–3–1–.02(7)) and ... [m]any of the changes that Georgia made to its PSD program to incorporate the federal NSR Reform Rules are also applicable to sources subject to NNSR permitting requirements."), just as Georgia's preexisting permit program tracked EPA's preexisting rules.

State plans like Georgia's currently do not guard against the new emissions increases allowed by the weakened permit provisions. *See* Brief of Government Petitioners (Attachment 17) at 21-24, 44-47; Reply Brief of Government Petitioners (Attachment 19) at 6, 9; Abt. Associates, *Nucor Steel Analysis* (Attachment 1); Abt. Associates, *Mobile Joliet Analysis* (Attachment 2); Environmental Integrity Project, *Bright Lines or Loopholes?* (Attachment 3); Affidavit of Craig A. Wright (Attachment 4); Affidavit of Dr. Iclal Atay (Attachment 5); Affidavit of Marc Allen Robert Cone, P.E. (Attachment 6); National Academy of Public Administration, *A Breath of Fresh Air* (Attachment 7); General Accounting Office, *EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program* (Attachment 9); Connecticut, *et al.* Reconsideration Comments (Attachment 11); Delaware Reconsideration Comments (Attachment 12); Environmental Integrity Project Letter to EPA (Attachment 13); William R. Moomaw, *Assessment of "Reform or Rollback?"* (Attachment 14); Environmental Integrity Project, *Additional Results and Corrections* (Attachment 15).

EPA does not deny this either. *See, e.g.,* Brief for Respondent United States Environmental Protection Agency *in New York v. EPA* at 77 ("State SIPs must include whatever provisions are necessary to ensure that sources do not contribute significantly to nonattainment in other States. 42 U.S.C. § 7410(a)(2)(D). EPA may enforce this requirement by compelling States to modify SIPs that are inadequate.") (emphasis added).

As it is revised by the above-listed provisions, it cannot be said of Georgia's plan that it "will cause no degradation of air quality." 71 Fed. Reg. 68,742/1. Georgia nevertheless has made no "demonstration that the emissions that are allowed by its revised rule but are prohibited by the current SIP would not interfere with attainment or other applicable requirements." 70 Fed. Reg. 36,903/3 (June 27, 2005); *see also* 69 Fed. Reg. 56,173/1 ("Approval of [a] SIP revision require[s] ... determination that it complies with section 110(l) of the Act."). Indeed, EPA does not propose to find that Georgia has made such a demonstration. *See* 73 Fed. Reg. at 51,606-10 (making no finding with respect to CAA Section 110(l)). Instead, EPA proposes to approve the above-listed Georgia provisions on the basis of its finding that those provisions are consistent with the parallel ones found in the agency's 2002 rule. *See, e.g., id.* at 51,609/1 ("EPA has determined that the proposed SIP revisions are consistent with the federal program requirements ... set forth at 40 CFR 51.166.").

But EPA has never made, or even proposed to make, a finding that revising Georgia's permit provisions so that they track the non-vacated provisions of the 2002 rule "will cause no degradation of air quality," 71 Fed. Reg. 68,742/1, or avoid "interfer[ing] with any applicable requirements concerning attainment and reasonable further progress, or any other applicable requirements of the CAA." 60 Fed. Reg. 10,506/2. The most the agency has been able to assert (without any substantiation whatsoever) is that "implementation of the 2002 rule" as a whole (*i.e.*, before large portions of it were vacated) will be "environmentally beneficial, or at worst, neutral" on a national scale. Brief for Respondent United States Environmental Protection Agency *in New York v. EPA* at 76.

Neither Georgia nor EPA has analyzed the particular impact of each part of the rule, much less the particular impact that each part's adoption by Georgia would have on that state's compliance with the requirements that it provide for attainment, prohibit emissions that interfere with attainment or maintenance, and require reasonable further progress toward expeditious attainment. *See* 42 U.S.C. §§ 7410(a)(2)(C), 7410(a)(2)(D)(i), 7501(1), 7502(a)(2)(A)-(B), 7502(c)(1) 7502(c)(2). This despite the D.C. Circuit's observation that the "invalidation of portions of the new rule may affect [the rule's] overall environmental impact as compared to the old rule," *New York v. EPA*, 413 F.3d at 43, and despite the court's corresponding admonishment:

> In light of our vacatur of the Clean Unit and PCP portions of the 2002 rule, . . . on which EPA relied in concluding that "collectively, the five NSR [provisions in the 2002 rule] will improve air quality," ENVIRONMENTAL IMPACT ANALYSIS at 2, there is a heightened need for EPA to have sufficient data to confirm that the remaining portions of the 2002 rule do not result in increased emissions that harm air quality and public health.

Id. at 30-31.

Indeed, EPA cannot make a finding that revising Georgia's permit provisions so that they track the non-vacated provisions of the 2002 rule "will cause no degradation of air quality," 71 Fed. Reg. 68,742/1, or avoid "interfer[ing] with any applicable requirements concerning

attainment and reasonable further progress, or any other applicable requirements of the CAA." 60 Fed. Reg. 10,506/2, because the opposite is plainly true. *See* NRDC, *et al.*, Petition for Reconsideration of 2003 NSR Rule (Attachment 22) at 7 ("NSR serves as a key component of the statutory program for attaining health-based air quality standards – an objective the Supreme Court has described as the 'heart' of, and 'central' to, the Act.") (quoting *Train v. NRDC*, 421 U.S. 60, 66 (1975)); Petition for Reconsideration of American Lung Association, *et al.* (Attachment 8) at 1-93; Reconsideration Comments of NRDC, *et al.* (Attachment 10) at 3-17, 19-27; Final Opening Brief of Environmental Petitioners (Attachment 16) at 11-33, 45-47; Brief of Government Petitioners (Attachment 17) at 16-35, 44-47, 51-53; Final Reply Brief of Environmental Petitioners (Attachment 18) at 2-16, 21-23; Reply Brief of Government Petitioners (Attachment 19) at 2-15, 21-26; Abt. Associates, *Nucor Steel Analysis* (Attachment 1); Abt. Associates, *Mobile Joliet Analysis* (Attachment 2); Environmental Integrity Project, *Bright Lines or Loopholes?* (Attachment 3); Affidavit of Craig A. Wright (Attachment 4); Affidavit of Dr. Iclal Atay (Attachment 5); Affidavit of Marc Allen Robert Cone, P.E. (Attachment 6); National Academy of Public Administration, *A Breath of Fresh Air* (Attachment 7); General Accounting Office, *EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program* (Attachment 9); Connecticut, *et al.* Reconsideration Comments (Attachment 11); Delaware Reconsideration Comments (Attachment 12); Environmental Integrity Project Letter to EPA (Attachment 13); William R. Moomaw, *Assessment of "Reform or Rollback?"* (Attachment 14); Environmental Integrity Project, *Additional Results and Corrections* (Attachment 15).

Therefore, finalizing the EPA rulemaking proposal at issue here would violate section 110(l) of the Act. 69 Fed. Reg. 56,173/1 ("EPA was not, and is not, in this rulemaking taking action on Kentucky's September 22, 2003, SIP revision to transfer the Jefferson County VET Program to a contingency measure in the SIP. ... Approval of the SIP revision to transfer the VET Program to the contingency portion of the SIP will require review of that SIP revision and determination that it complies with section 110(l) of the Act. That analysis has not yet been completed."); *see also* 70 Fed. Reg. 35,946, 35,956/1 (June 21, 2005) ("[T]he State has not made a demonstration under section 110(l) of the CAA that the conversion of the vehicle I/M program in the Cincinnati area (and in the Dayton area) to a contingency measure will not interfere with attainment of the affected NAAQS or with compliance with other requirements of the CAA. Therefore, we cannot approve, at this time, the State's request to make vehicle I/M a contingency measure in the Cincinnati area 1-hour ozone maintenance plan."); *id* at 35951/2 ("EPA must complete rulemaking finding that . . . section 110(l) of the CAA ha[s] been satisfied before Ohio discontinues the E-Check program and converts E-Check to contingency measures in the ozone maintenance plans for the Cincinnati and Dayton areas."); *id.* at 36949/3-50/1 ("We are deferring this discussion until we review Ohio's section 110(l) demonstrations of non-interference with attainment of other NAAQS and with compliance with the requirements of the CAA for this area. Through that future rulemaking, the public will be given an opportunity to review and comment on Ohio's new emission projections for 2010 and 2015."); *id.* at 35954/2; *id.* at 35955/2; *id.* at 35955/3; *id.* at 35958/2.

B. The Same Provisions in Ohio's Submission Violate Section 193 in Part D.

The same Ohio provisions discussed in part A, *supra*, violate the Clean Air Act's part D, section 193 ban on "backsliding" in nonattainment areas.

Section 193 declares, in part, that

> No control requirement in effect . . . before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

42 U.S.C. § 7515.

[Please note: In *New York v. EPA*, the D.C. Circuit dismissed as unripe the government petitioners' claim that EPA's promulgation of the 2002 NSR rule violated section 193, on the grounds that EPA had not yet taken action on any state regulations promulgated in response to that rule. 413 F.3d at 42. EPA is attempting to take such action now, in this rulemaking.]

NSR is a "control requirement," because it controls emissions increases. *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 901 (D.C. Cir. 2006) ("Past and current practice confirms that NSR is a control."). *See also* 67 Fed. Reg. at 80,187/2 (Dec. 31, 2002) ("The NSR provisions of the Act are a combination of air quality planning and air pollution control technology program requirements for new and modified stationary sources of air pollution.") (emphasis added); 64 Fed. Reg. 29,563-64 (June 2, 1999) (analyzing Rhode Island's state implementation plan revisions, including changes to NSR applicability requirements, in light of section 193); 58 Fed. Reg. 10964-65 (Feb. 23, 1993) (Massachusetts' state implementation plan revision consistent with section 193 because it would "insure equivalent reductions with Massachusetts' prior NSR program"); EPA Opening Merits Brief in *Chevron, U.S.A. v. NRDC*, S. Ct. 82-1005 (Aug. 31, 1983), 1982 Lexis U.S. Briefs 1005, at n.55 (NSR is one of the "pollution-control measures" applicable in nonattainment areas.); 42 U.S.C. §§ 7501(3), 7503(a)(2) (sources subject to NSR must apply "lowest achievable emission rate," which is a stringent "emission limitation."); *id.* § 7602(k) (defining "emission limitation" as "a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter"); *id.* § 7503(d) ("The State shall provide that control technology information from permits issued under this section will be promptly submitted to the Administrator for purposes of making such information available through the RACT/BACT/LAER clearinghouse to other States and to the general public.") (emphasis added); *id.* § 7408(h) (provision entitled "RACT/BACT/LAER Clearinghouse" provides: "The Administrator shall make information regarding emission control technology available to the States and to the general public through a central database. Such information shall include all control technology information received pursuant to State plan provisions requiring permits for sources, including operating permits for existing sources.")

(emphasis added); *id.* § 7503(a)(5) (requiring an alternatives analysis that considers *inter alia* the source's "environmental control techniques"); *id.* § 7418(a) (requiring federal facilities to comply with requirements for "the control and abatement of air pollution," including "any requirement respecting permits"); 1990 House Report at 234 (describing NSR as a "graduated control program" involving increasingly protective requirements for higher classifications, and including – as the first three examples of that control program – provisions relating to NSR); *id.* at 272 (RACT/BACT/LAER clearinghouse is to include *inter alia* information on "lowest achievable emission rate control requirements proposed or adopted in each State") (emphasis added); *Lead Industries Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1149 n.37 (D.C. Cir. 1980) (referring to measures in state implementation plans that impose pollution control requirements on sources).

Moreover, when NSR is triggered, it often achieves emissions reductions. That is the case for sources in attainment areas, because the installation of best available control technology reduces a previously grandfathered unit's emissions below the pre-modification level. It is especially the case for sources in nonattainment areas. Specifically, the permitting agency cannot issue an NSR permit unless it determines that "by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title)." 42 U.S.C. § 7503(a)(1)(A); *see also id.* § 7501(a) (defining "reasonable further progress" as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date"); *id.* § 7503(c); 1990 House Report at 234 ("Also included in the graduated control requirements are increasing offset ratios that require a greater level of pollution reductions from other sources in the nonattainment area to offset increases in pollution from new sources or modifications. This program is intended to allow economic growth and the development of new pollution sources and modifications to continue in seriously polluted areas, while assuring that emissions are actually reduced.") (emphasis added). *Accord, id.* at 244 (explaining NSR requirements for extreme areas, committee notes that those areas "cannot afford to miss any opportunity for greater emission reductions") (emphasis added).

The Georgia provisions identified in part A, *supra*, modify NSR in several significant respects. Notwithstanding that fact, Georgia has made no demonstration, and EPA has proposed no finding, that the modifications ensure "equivalent or greater emissions reductions." 42 U.S.C. § 7515. EPA made no such finding either with respect to any of the 2002 rule provisions that Georgia's provisions track. Those facts alone establish that if EPA takes final action on its proposal, the action will violate section 193. *See* 64 Fed. Reg. 70,652, 70,654 (Dec. 17, 1999) ("[T]he language is in fact 'extraordinarily rigid' in its requirement to provide equivalent or greater emission reductions to offset relaxations to pre-1990 rules. . . . [S]ection 193 unambiguously requires any relaxations to control requirements or plans in effect prior to enactment of the CAA amendments of 1990 to be offset by equivalent or greater emission

reductions. The clarity of the statutory language supported by the legislative history evidences intent by Congress that relaxations to pre-1990 requirements should occur only where compensating strengthening will result in no increase in emissions."); *id.* at 70,656 ("compensating reductions must be contemporaneous with the relaxation").

Moreover, Georgia cannot make a demonstration of equivalency, and EPA cannot make such a finding. Because, far from ensuring "equivalent or greater emission reductions" than Georgia's preexisting permit provisions, the modifications ensure that emissions will not be reduced as much as under the preexisting rules. In fact, the modifications allow emissions to increase in Georgia's nonattainment areas. *See* 61 Fed. Reg. at 38,251 (July 23, 1996) (the rulemaking was intended to "significantly reduce the number and types of activities" that trigger NSR); Brief of Government Petitioners (Attachment 17) at 18-26, 26-33, 44-47, 51-53; Reply Brief of Government Petitioners (Attachment 19) at 2-15, 21-23, 25-26; Petition for Reconsideration of American Lung Association, *et al.* (May 8, 2003) (Attachment 8), at 1-93; Reconsideration Comments of NRDC, *et al.* (Aug. 28, 2003) (Attachment 10), at 3-17, 19-27; Final Opening Brief of Environmental Petitioners (Attachment 16), at 11-33, 45-47; Final Reply Brief of Environmental Petitioners (Attachment 18) at 2-16, 21-23; Abt. Associates, *Nucor Steel Analysis* (Attachment 1); Abt. Associates, *Mobile Joliet Analysis* (Attachment 2); Environmental Integrity Project, *Bright Lines or Loopholes?* (Attachment 3); Affidavit of Craig A. Wright (Attachment 4); Affidavit of Dr. Iclal Atay (Attachment 5); Affidavit of Marc Allen Robert Cone, P.E. (Attachment 6); National Academy of Public Administration, *A Breath of Fresh Air* (Attachment 7); General Accounting Office, *EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program* (Attachment 9); Connecticut, *et al.* Reconsideration Comments (Attachment 11); Delaware Reconsideration Comments (Attachment 12); Environmental Integrity Project Letter to EPA (Attachment 13); William R. Moomaw, *Assessment of "Reform or Rollback?"* (Attachment 14); Environmental Integrity Project, *Additional Results and Corrections* (Attachment 15).

Indeed, as the government petitioners noted in their opening brief in *New York v. EPA*:

> EPA has previously taken the position that NSR regulations that increase industry flexibility are less stringent. For example, in the *Duquesne Light* case referenced above, EPA argued that the State's definition of "actual emissions" was more stringent than EPA's because it limited industry's flexibility to "look back" to set its baseline for purposes of calculating emissions reduction credits. *See* Brief of Respondent EPA in *Duquesne Light Co. v. EPA*, 1998 WL 34084103, at 13 (Oct. 26, 1998) ("Pennsylvania's definition is easily recognized as more stringent than the federal definition."). In support of this argument, EPA cited the "ten-year lookback" provision of its own 1996 proposed rule as an example of a regulation that "increases industry flexibility" and therefore is less stringent. *Id.* at 19; *see also id.* at 18 (it is "self-evident" that a state regulation that prohibits a facility from using a "bubble" approach in measuring emissions increases is more stringent than an EPA regulation with the "bubble" concept).

Brief of Government Petitioners (Attachment 17) at 47; *see also* Reply Brief of Government Petitioners (Attachment 19) at 22-23 ("*See* Brief of EPA in *Duquesne Light Co. v. EPA*, 1998 WL 34084103 . . . at 13 ('Pennsylvania's [baseline emissions] definition is easily recognized as more stringent than the federal definition.')").

Therefore, Georgia's modifications violate section 193, and any EPA approval of those modifications (even a partial or conditional approval) will also violate section 193. Moreover, because section 193 lies within part D, the Georgia provisions prevent the permit program in the state's revised plan from being "as required in parts C and D," *id.* § 7410(a)(2)(C), from "meet[ing] the applicable requirements of . . . part C," *id.* § 7410(a)(2)(J), and from "meet[ing] the applicable requirements of part D." *Id.* § 7410(a)(2)(I). Thus, if EPA approves Georgia's revised plan, that action will additionally exceed the agency's authority under section 110(k)(3) and violate section 100(l).

C. EPA must disapprove of the Georgia's incorporation of "baseline emissions calculations" into the Georgia NNSR provisions for the generation of Emissions Reductions' Credits to be used as offsets.

Although EPA proposes to approve the majority of Georgia's proposed SIP revisions, the proposal states that EPA also is proposing to disapprove a portion of Georgia's planned revisions. More specifically, EPA has proposed to disapprove of the state's incorporation of "baseline emissions calculations" into the Georgia NNSR provisions for the generation of Emissions Reductions' Credits to be used as offsets. Georgia's proposed revision to Georgia Rule 391-3-1-.03(13)(c) is unlawful.

Revised Georgia Rule 391-3-1-.03(13)(c) is plainly inconsistent with the corresponding federal provision, which states:

> Each plan shall provide that for sources and modifications subject to any preconstruction review program adopted pursuant to this subsection the baseline for determining credit for emissions reductions is the emissions limit under the applicable State Implementation Plan in effect at the time the application to construct is filed, except that the offset baseline shall be the actual emissions of the source from which offset credit is obtained ...

40 C.F.R. § 51.165(a)(3)(ii) (emphasis added). The applicable federal rule therefore bars EPA from approving revised Georgia Rule 391-3-1-.03(13)(c).

The preamble to the 2002 NSR Reform Rule reinforces that revised Georgia Rule 391-3-1-.03(13)(c) is unlawful. The preamble poses the question "Am I Able to Apply Today's Changes for Calculating the Baseline Actual Emissions to Other Major NSR Requirements?" and then plainly answers:

> No, as stated in section II.A, you are only allowed to use the new baseline methodology in today's rule for three specific purposes involving existing emissions units as follows.
>
> • For modifications, to determine a modified unit's pre-change baseline actual emissions as part of the new actual-to-projected-actual applicability test.
>
> • For netting, to determine the prechange actual emissions of an emissions unit that underwent a physical or operational change within the contemporaneous period. You may select separate baseline periods for each contemporaneous increase or decrease.
>
> • For PALs, to establish the PAL level.

67 Fed. Reg. at 80,196/1 (emphasis added). The preamble to the 2002 NSR Reform Rule further states:

> Today's new procedures for calculating baseline actual emissions and for the actual-to-projected-actual applicability test should not be used when determining a source's actual emissions on a particular date as may be used for other NSR-related requirements. Such requirements include, but are not limited to, air quality impacts analyses (for example, compliance with NAAQS, PSD increments, and AQRVs) and computing the required amount of emissions offsets. For each of these requirements, the existing definition of "actual emissions" continues to apply.

Id. at 80,191/3 (emphasis added). Clearly, Georgia's proposed revision to Georgia Rule 391-3-1-.03(13)(c) is unlawful and must be disapproved.

CONCLUSION

For the reasons stated above, if EPA took final action approving – even partially or conditionally – Georgia's revised plan, that action would be "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A).

ATTACHMENTS INCORPORATED BY REFERENCE HEREIN

1. Abt. Associates, Inc., *Analysis of the Effect of Alternate Baselines for Clean Air Act New Source Review: Nucor Steel – Crawfordsville, Indiana*, Oct. 21, 2002.

2. Abt. Associates, Inc., *Analysis of Alternate Baselines for CAA Prevention of Significant Deterioration New Source Review: Mobile Joliet, Illinois*, Oct. 21, 2002.

3. Environmental Integrity Project, *Bright Lines or Loopholes? How Industrial Accidents Can Help Increase Pollution Under the Bush Administration's Clean Air Act "Reforms,"* Dec. 2002.

4. Affidavit of Craig A. Wright *in New York v. EPA*, D.C. Cir. Case No. 02-1387 (filed Jan. 31. 2003).

5. Affidavit of Dr. Iclal Atay *in New York v. EPA*, D.C. Cir. Case No. 02-1387 (filed Feb. 3, 2003).

6. Affidavit of Marc Allen Robert Cone, P.E. *in New York v. EPA*, D.C. Cir. Case No. 02-1387 (filed Feb. 4, 2003).

7. National Academy of Public Administration, *A Breath of Fresh Air: Reviving the New Source Review Program*, Apr. 2003.

8. American Lung Association, *et al.*, Petition for Reconsideration of 2002 NSR Rule, May 8, 2003.

9. United States General Accounting Office, *Report to Congressional Requesters: Clean Air Act: EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program*, Aug. 2003.

10. NRDC, *et al.*, Reconsideration Comments on 2002 NSR Rule, Aug. 28, 2003.

11. Connecticut, *et al.*, Reconsideration Comments on 2002 NSR Rule, Aug. 28, 2003.

12. Delaware, Reconsideration Comments on 2002 NSR Rule, Aug. 28, 2003.

13. Environmental Integrity Project, Letter to EPA, Sept. 12, 2003.

14. William R. Moomaw, *Assessment of the Report "Reform or Rollback" How EPA's Changes to New Source Review Affect Air Pollution in 12 States,"* Sept. 12, 2003.

15. Environmental Integrity Project, *"Reform or Rollback?" Additional Results and Corrections,* Sept. 2, 2003.

16. Final Opening Brief of Environmental Petitioners *in New York v. EPA*, D.C. Cir. Case No. 02-1387 (filed Oct. 26, 2004).

17. Brief of Government Petitioners *in New York v. EPA*, D.C. Cir. Case No. 02-1387 (filed Oct. 18, 2004).

18. Final Reply Brief of Environmental Petitioners *in New York v. EPA*, D.C. Cir. Case No. 02-1387 (filed Oct. 26, 2004).

19. Reply Brief of Government Petitioners *in New York v. EPA*, D.C. Cir. Case No. 02-1387 (filed Oct. 18, 2004).

20. *New York v. EPA*, 413 F.3d 3 (D.C. Cir. June 24, 2005).

21. American Lung Association, *et al.*, Comments on Proposed 2003 NSR Rule, May 2, 2003.

22. NRDC, *et al.*, Petition for Reconsideration of 2003 NSR Rule, Dec. 24, 2003.

23. NRDC, *et al.*, Reconsideration Comments on 2003 NSR Rule, Aug. 30, 2004.

24. Environmental Petitioners' Motion for a Stay Pending Review *in New York v. EPA*, D.C. Cir. Case No. 03-1380 (filed Nov. 17, 2003).

25. Environmental Petitioners' Reply in Support of Stay Motion *in New York v. EPA*, D.C. Cir. Case No. 03-1380 (filed Dec. 12, 2003).

26. Order on Motions to Stay *in New York v. EPA*, D.C. Cir. Case No. 03-1308 (Dec. 24, 2003).

27. NRDC, *et al*, Supplemental Reconsideration Comments on 2003 NSR Rule, Oct. 22, 2004.

28. United States Environmental Protection Agency, Office of Inspector General, *Evaluation Report: New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-Fired Electric Utilities*, Sept. 30, 2004.

29. Joel A. Mintz, "'Treading Water': A Preliminary Assessment of EPA Enforcement During the Bush II Administration, *ELR News & Analysis*, Oct. 2004.

30. NRDC, *et al.*, Supplemental Reconsideration Comments on 2003 NSR Rule, Dec. 7, 2004.

31. NRDC, *et al.*, Supplemental Reconsideration Comments on 2003 NSR Rule, Mar. 25, 2005.